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RELUCTANT INSURERS THREATEN PHYSICIANS' ASSETS

Bad faith settlement negotiations can lead to high damage awards

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The mishandling of a claim by an insurance company may put a policyholder's personal assets at risk where verdicts or judgments exceed policy limits. Nowhere is this risk illustrated more clearly than in connection with two recent medical malpractice cases, *Carlson v. Waterbury Hospital* and *Oram v. DeCholnoky*.

In *Carlson*, a wrongful death case, the court affirmed an \$11 million jury award in favor of the estate and reduced the award in favor of the decedent's wife to \$6.5 million. The court also affirmed interest on the offer of judgment in the amount of \$1 million which, as the court pointed out, was the amount of available insurance coverage.

In *Oram*, a jury awarded the plaintiffs \$38.5 million in damages. Plaintiffs' counsel indicated that up until jury selection, all claims could have been settled against the defendant physician for the \$2 million policy. The insurer offered only \$1.25 million to settle.

The outcomes in *Carlson* and *Oram* resulted in large gaps between the available insurance and the judgment awards. As a consequence, the plaintiffs have to consider alternate methods for collection.

Historically, plaintiffs' counsel have rarely pursued physicians' personal assets to



bridge this gap. Moreover, in cases where the insurer has acted in bad faith in failing to settle a claim within policy limits, courts have typically held that it is the insurer which should be held accountable for the shortfall in available insurance. Although not specifically addressed by Connecticut courts, the measure of damages for an insurer's bad faith failure to settle in other jurisdictions, including New York, is the full amount of the judgment in excess of policy limits.

No Bright Line

Connecticut courts have not established a bright line test for bad faith with respect to accepting or rejecting settlement offers as it concerns medical malpractice claims. Courts, however, have generally recognized that an insurer has an obligation to accept a good-faith settlement offer and to exercise honest judgment, using the same care and diligence that a person of ordinary prudence would exercise.

Unfortunately, this general duty of "good faith" provides little guidance to insureds as to what constitutes a breach of the covenant of good faith and fair dealing in Connecticut and, particularly, when an insurer's failure to settle is considered bad faith.

Other states have addressed the issue head on and have provided better guidance on the subject. For example, in *General Accident Fire & Life Assurance Corp. v. Little*, the Arizona Supreme Court enumerated in 1968 several factors to be considered in determining whether an insurer's failure to settle a claim within policy limits is in bad faith.

These factors include: (1) the strength of the insured's case on the issues of liability and damages; (2) attempts by the insurer to induce the insureds to contribute to a settlement; (3) the insurer's failure to investigate and evaluate the evidence against the insured; (4) the insurer's rejection of advice of its attorney; (5) failure of the insurer to notify

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the insured's about a settlement demand; (6) whether the insured misled the facts, which caused the insurer to reject the settlement.

In the Florida case, *Jones v. Continental Ins. Co.*, a federal district court held in 1987 that the insurer is "contractually obligated to place the insured's interests (which is to avoid an excess judgment) before its own (which is to pay as little as possible)."

In West Virginia, there is a "hybrid negligence-strict liability standard . . . [W]henver there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability . . . the insurer has *prima facie* failed to act in its insured's best interest and that such failure to so settle *prima facie* constitutes bad faith toward its insured," *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W. Va. 585, 595 (W. Va. 1990).

Heightened Awareness

When considering the above standards, the insurer's duty to settle should be

heightened in medical malpractice cases compared to other cases. Medical malpractice damages are usually significant and can include loss of life or permanent disability.

In addition, due to the requirement that the plaintiff file a certificate of good faith from a licensed health-care provider at the time of filing the complaint, the insurer would have a difficult time arguing that a case was entirely without merit. Furthermore, with the publicity that medical malpractice verdicts often receive, insurers should have a heightened awareness of the potential for a large jury verdict and the potential for a verdict in excess of policy limits. Some courts have held that an insurer, which has expertise and knowledge of lawsuits and verdicts, is held to a higher standard in evaluating a settlement than that of an average person.

Should the insurer's failure to settle a claim within policy limits constitute bad faith, it may force an unlikely alliance between the defendant physician and the

underlying plaintiff.

In Connecticut, only contracting parties may enforce the implied covenant of good faith and fair dealing. The state Supreme Court has recognized, however, that an insured, which has entered into a stipulated judgment with an underlying plaintiff, may assign to the plaintiff its claims against the insurer for failing to defend the insured. Other states have specifically approved of the insured's assignment of a bad faith failure to settle a medical malpractice claim to the underlying plaintiff. In fact, a general assignment of *all claims* against the insurer should be sought by the underlying plaintiff.

In addition to bad faith, there may be a pursuable breach of contract, negligence and CUTPA/CUIPA claims against the insurer. There does not appear to be any rationale for the Connecticut courts to prohibit such an assignment, and, ultimately, such assignment might not only protect the personal assets of physicians but get full compensation for the injured plaintiff, as well. ■